Supreme Court, U.S.
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No. 93-——

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

In re: STANLEY ALAN AZEN, M.D.,
Petitioner,

PETITION FOR A WRIT OF MANDAMUS TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, AND THE HONORABLE BETTY B. FLETCHER, JUDGE OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT; THE HONORABLE STEPHEN S. TROTT, SENIOR JUDGE OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, DRUG ENFORCEMENT ADMINISTRATION; MARY ELLEN BITTNER, ADMINISTRATIVE LAW JUDGE; STEPHEN GREEN, ACTING ADMINISTRATOR

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QUESTION PRESENTED

Notwithstanding the factors contained in 21 U.S.C. Section 824, does the statute sufficiently afford medical practitioners the constitutional safeguards necessary to guarantee that the statute will be applied with a reasonable degree of consistency.

LIST OF PARTIES

The following party was a Plaintiff below and is a Respondent before this Court:

Drug Enforcement Administration

The following party was a Defendant below and is a Petitioner before this Court:

Stanley Alan Azen, M.D.

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INTRODUCTION

Petitioner Stanley Alan Azen, M.D. ("Dr. Azen") respectfully prays that a writ of mandamus issue to the Ninth Circuit Court of Appeals requesting that they grant Dr. Azen's emergency motion staying enforcement of the Acting Administrator's order pending petitioner's appeal.

OPINIONS BELOW

The decision of the Acting Administrator is published at Stanley Alan Azen, M.D., Docket No. 92-54, 59 FR 10168 and is reprinted in the accompanying Appendix to this petition at page 1a. The unpublished order from the Ninth Circuit Court of Appeals denying petitioner's emer-

gency motion for relief is reprinted in the Appendix to this petition at page 11a.

JURISDICTION

The Controlled Substance Act ("CSA") requires that every practitioner who dispenses or distributes any controlled substance in connection with his practice first must obtain a certificate of registration from the Attorney General. 21 U.S.C. Section 822(a), 823(f). The CSA vests authority in the Attorney General to deny, revoke or suspend registration, 21 U.S.C. Section 824. The Attorney General, however, has delegated authority to the Administrator of the Drug Enforcement Administration. 28 C.F.R. 0.100(b) (1987).

All final determinations, findings, and conclusions of the Attorney General related to Administrative and Enforcement Provisions shall be final and conclusive. Any person aggrieved by a final decision of the Attorney General may obtain review of the decision in the United States Court of Appeals in which his principal place of business is located upon petition filed within thirty days after notice of the decision. 21 U.S.C. Section 877. The appropriate petition for review was timely filed in the United States Court of Appeals for The Ninth Circuit.

An emergency motion was timely filed requesting that the Ninth Circuit Court of Appeals stay enforcement of the Acting Administrator's order pending the appeal. The request for the stay was denied. Jurisdiction in this Court is invoked under 28 U.S.C. Section 1651(a), which permits the Supreme Court to issue writs when appropriate or necessary.

STATEMENT OF THE CASE

Initial Proceedings

On May 19, 1992 the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration ("DEA"), directed an Order to Show Cause to Dr. Stanley Alan Azen ("Dr. Azen") seeking to deny his

renewal application for a Certificate of Registration with the DEA. Dr. Azen, through counsel requested a hearing on the issues raised by the Order to Show Cause and the matter was placed on the docket of Administrative Law Judge, Mary Ellen Bittner. At the hearing Dr. Azen presented evidence which proved by a preponderance of evidence that his continued registration was not inconsistent with the public interest, and therefore, should be renewed.

To date the Government has been unable to place into the record any competent evidence from which it could be inferred that Dr. Azen at any time was remiss in his medical duties or a risk to public interest. At the administrative hearing Dr. Azen presented testimony of his colleagues and supervisors who have worked by Dr. Azen's side for over ten years. Each of these Doctors testified under oath as to Dr. Azen's outstanding medical abilities and the degree to which they rely on his abilities. Each affirmatively stated that they would not have any reservations maintaining Dr. Azen on their respective medical staffs.

The grounds upon which the DEA bases its decision is predicated in large part upon unsupported allegations which have not been proven in the several court proceedings involving Dr. Azen.

As noted in the Administrative Hearing transcript, supervising Deputy District Attorney Steven Barshop negotiated Dr. Azen's plea down to simple possession. (R.T. p. 155 ln. 17-25; p. 158 ln. 11-16). Implicit in the District Attorney's decision is the undeniable fact that what evidence the District Attorney's office did have against Dr. Azen lacked credibility.

The first case brought against Dr. Azen was *People of the State of California v. Stanley Azen, M.D.* which was heard before the honorable Judge David Perez in the Los Angeles Superior Court, West District. The facts surrounding Dr. Azen's arrest and the subsequent state case have become the center piece for every subsequent

action filed against him. Although there were allegations of a controlled purchase there was insufficient evidence to support said charge. Dr. Azen entered into a *nolo contendere* plea to one count of simple possession.

The common denominator running throughout the several cases filed against Dr. Azen was a detective assigned to the Narcotics Group of the Los Angeles Police Department. The detective was instrumental in orchestrating the alleged controlled buy from Dr. Azen. It was his affidavit which established the probable cause for both the search and arrest warrants. In addition, it was his report that the Deputy District Attorney and the Assistant United States Attorney used in determining what charges to file.

Simultaneously with the criminal action, the United States Attorney filed Civil Forfeiture actions against Dr. Azen's residence and automobile. *USA v. One Jeep Cherokee*, CV91 3944-DWW(Sx) and *USA v. Real Property*, CV91 2089-DWW(Sx). These two cases are distinguished principally from the criminal action because the burdens of proof attendant to civil actions is by a preponderance of evidence.

The case involving the Jeep Cherokee, was heard before the Honorable David W. Williams, Senior Judge of the United States District Court for the Central District of California. The detective was again the government's only witness and again his testimony and the evidence presented were insufficient to sustain the burden of proof required in a civil case as the evidence had little if any indicia of reliability. Despite the lower burden of proof, the Federal Government was only able to show that Dr. Azen possessed one quarter gram of cocaine. The court found for Dr. Azen and the Jeep Cherokee was returned.

Immediately following his arrest and recognizing his need for help, Dr. Azen attempted, on two separate occasions, to enter into a diversion program offered by the Board of Medical Quality Assurance. Unfortunately the Medical Board refused to help Dr. Azen so he volun-

tarily checked into the Betty Ford Clinic in Palm Springs, California on April 11, 1991. Through one on one counseling and group therapy, Dr. Azen has not used any drugs or alcohol for over three years.

Throughout the administrative hearing, Dr. Azen presented testimony from highly trustworthy witnesses, including his probation officer and hospital supervisors. This testimony came from witnesses with personal knowledge of Dr. Azen's character and medical professionalism. Given the various competing concerns between probation officer/client and employer/employee the testimony was free of any bias. In contrast to the hearsay testimony provided by the Government, all of the testimony provided by Dr. Azen at the hearing was subject to cross-examination. The record shows that these witnesses fully support Dr. Azen's position that his days of substance abuse are over.

In point of fact, it appears that Dr. Azen is not only the most vigorously active member of his employment group at Pacifica Hospital (R.T. Vol.2 p. 288 ln. 15), but his removal from the hospital staff would have a detrimental impact on the inner city community in which Pacifica Hospital is located. (R.T. Vol.2 p. 294 ln 1-11).

The broad issue before the Administrative Law Judge was whether continued registration of Dr. Azen was inconsistent with public interest as determined pursuant to 21 U.S.C. Sections 823(f) 824(a)(2) and (a)(4).

Direct testimony was given by Dr. Azen's probation officer, who stated that because Dr. Azen had been such an exemplary participant of the testing program, she suggested that testing be terminated. Dr. Azen rejected the request and continued testing at the same rate. Throughout the random testing procedure with the probation officer Dr. Azen has never once tested positive. Moreover, on recross and before the Government could withdraw its series of questions, the probation officer stated that she would have no problem recommending that Dr. Azen's probation be suspended due to his consistent high

level of performance. At one point in the hearing, the probation officer stated that it was her belief that Dr. Azen was complying with the tests because he wanted to test drug free and thus be drug free. (R.T. Vol. 1 p. 239 ln 12-25; p. 240 ln. 1-4).

Testimony was also given by Dr. Val Warhaft, Dr. Azen's supervisor at Pacifica Hospital. Under oath Dr. Warhaft stated Dr. Azen is the most reliable doctor on the hospital staff. In his opinion, Dr. Azen is a credit to the profession and a valuable member of the underserved community. He stated this was especially true at a time, where due to economic concerns, we have seen the virtual collapse of trauma centers in Los Angeles and at a time where there has been a visible shift of doctors away from the high stress, low paying jobs usually found in the inner cities. Simply stated Dr. Warshaft did not feel that the public interest was at risk by the continued registration of Dr. Azen. To the contrary, Dr. Warhaft felt that the public interest would be at risk should the DEA revoked Dr. Azen's certificate of registration.

As an emergency room physician Dr. Azen is required to make split second decisions as to the diagnosis and prognosis of a patient. He does not have the benefit of conferring with a specialist in any particular field or the benefit of researching the different avenues of treatment. In an emergency room the difference between life and death could be only a matter of seconds. Dr. Azen makes these decisions consistently, vigorously and with the quality and sense of purpose that is envied by his contemporaries.

The Administrative Judge was asked by the Government to find that Dr. Azen was a risk to the public interest. In its attempt to persuade the court the Government introduced an affidavit of one witness, whose statement has been declared untrustworthy by both the State Court and Administrative Law Judge. The Administrative Law Judge was asked to make a decision that not only affects the career of a highly qualified and equally respected

medical practitioner, but which also affects the indigent community in which he works. This very important decision had to be based upon the affidavit of a witness who lacked credibility and who has refused to testify under oath where she would be subject to cross examination.

On the other hand Dr. Azen provided highly reliable evidence, subjected to cross-examination, as to the quality of medical care he provides, as well as to the extent to which the community he serves benefits. The testimony provided by Dr. Azen was not from doctors who knew him in passing. The testimony was from doctors who have first hand, long term personal knowledge of Dr. Azen's work and dedication as an emergency room doctor. Great weight should be given to the testimony provided on behalf of Dr. Azen as it goes directly to the public interest concerns giving rise by this hearing.

REASONS FOR GRANTING THE WRIT

I. DR. AZEN WOULD SUFFER SEVERE AND IRREPARABLE HARM SHOULD HE BE FORCED TO AWAIT THE FINAL DECISION FROM THE NINTH CIRCUIT COURT OF APPEALS

Dr. Azen has timely filed the appropriate appeal from the Administrator's ruling. Appellant's brief is due on or before June 13, 1994. The anticipated relief will not be granted for several months. During this time Dr. Azen will be precluded from working at Pacifica Hospital. As previously stated, Petitioner's emergency motion for a stay pending the Appeal has been denied.

If Dr. Azens' DEA license is revoked, he will be unable to work as an emergency room physician. Prescribing and dispensing medication to patients is a necessity for an emergency room doctor. As Dr. Warhaft stated at the hearing the surrounding community will suffer if Dr. Azen is unable to work at the hospital. As he further stated, replacing a doctor with Petitioners ability

and experience in the emergency room at Pacifica Hospital would be unrealistic and highly improbable.

Dr. Azen is a first time offender. As the Court will see there are numerous cases in which doctors have been able to continue their registration even though their conduct was far more culpable than Petitioners.

II. 21 U.S.C. §§ 822, 823 AND 824 RAISE COMPELLING AND RECURRENT QUESTIONS CONCERNING THE INCONSISTENCY IN THE STANDARDS EMPLOYED BY ADMINISTRATIVE LAW JUDGES AND THE ACTING ADMINISTRATOR OF THE DRUG ENFORCEMENT ADMINISTRATION.

Pursuant to 21 U.S.C. § 824(a)(2), the acting Administrator may revoke a DEA Certificate of Registration if the registrant has been convicted of a felony relating to controlled substances. Pursuant to 21 U.S.C. §§ 823(f) and 824(a)(4) the Administrator may revoke a registration and deny and application for such registration, if he determines that the continued registration would be inconsistent with the public interest. In determining whether to invoke the authority the following factors are to be considered.

"(1) The recommendation of the appropriate State Licensing Board or professional disciplinary authority.

(2) The applicant's experience in dispensing controlled substances.

(3) The applicant's conviction record under Federal or State laws relating to the distribution, or dispensing of controlled substances.

(4) Compliance with applicable State, Federal, or local laws relating to controlled substances.

(5) Such other conduct which may threaten the public health and safety." [1]

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[1] The public interest standard was added in 1984 in recognition of the specific weaknesses of the felony conviction criteria that

It is conceded that the Administrator may properly rely on any one or a combination of the factors and give each factor the weight he deems appropriate. *Henry J. Schwarz, Jr., M.D.*, Docket No. 88-42, 54 FR 16422 (1989), however, this discretionary power gives rise to the glaring inconsistency in the Administrator's rulings.[2]

We begin with *Trawick v. Drug Enforcement Administration*, 861 F.2d 72. Dr. Trawick was convicted of selling controlled substances to an undercover officer. It was here that the Court first addressed the public interest standard which was added in 1984 to the Controlled Substance Act. *Trawick* recognized and gave significant discussion to the legislative intent behind the amendment. The legislature felt compelled to formulate the amendment in response to the amount of evidence which suggested that prescription drugs diverted by legitimate medical distributors accounted for seventy-five per cent of the deaths and injuries related to drug abuse. The amendment made it easier to revoke the DEA license of physicians who write or dispense prescription drugs in a way that is threatening to the public health. 130 Cong. Rec. 119681. Congress, however, never intended the public interest amendment to be extended to misdemeanor offenses unrelated to the registrant's practice or the purpose of the amendment. The amendment arose as part of the Dangerous Drug Diversion Control Act which specifically targeted dispensing practitioners who abuse their registrations by diverting legitimate prescription drugs for illegitimate purposes.

Despite the amendment's intent to provide "greater flexibility" to deny and revoke registrations, Congress

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made it difficult to reach the many violations involving controlled substances which are prescription drugs but are not punishable as felonies under state law. S. Rep. No. 225 98th Cong., 2d Sess.

[2] There are several Administrative Law Judges operating under one acting Administrator. An Acting Administrator serves a two year term.

intended that the flexibility be exercised in the most "egregious" cases, where the practioner's registration is clearly contrary to the public interest. The Court in *Trawick*, however, stated that it is clearly reasonable to interpret this unambiguous language as allowing negative action based on a misdemeanor possession conviction that is unrelated to the registrant's practice.

The issue arises not due to the decision, rather, the issue arises as a result of the facts supporting the decision. In addition to Dr. Trawick being convicted for selling controlled substances to an undercover agent he was also an acknowledged user of controlled substances. Additionally, the state's licensing board did more than just file for a disciplinary hearing. The Board affirmatively revoked Dr. Trawick's license to practice medicine. It was only at this point that the Administrative Law Judge recommended that the Certificate of Registration be revoked. Subsequently, the acting Administrator followed the recommendation.

Because of the facts contained in the record, the Judge in *Trawick* believed that the doctors continued registration was inconsistent with the public interest.

The problem with *Trawick*, is that there are numerous other decisions by the Administrator that allow a doctor to keep his license even when the doctors conduct was far more culpable than that of Dr. Trawick.

The Administrator has denied applications to doctors who knowingly and unlawfully dispense controlled drugs to known drug traffickers *Lakshmi N. Achalla, M.D.*, Docket No. 93-6133, 58 FR 14426; prescribing drugs for the doctor's own personal use while falsifying medical records and failing to keep required records *Ruggerero Angiolicchio, M.D.*, Docket No. 93-6138, 58 FR 14426; knowingly prescribing drugs to patients who were addicted to the very same drugs while failing to file the necessary exceptions to the Administrative Law Judge's findings, *Henry J. Schwarz, Jr., M.D.*, Docket No. 88-42, 54

FR 16422 (1989); distribution of LSD, *Paul Stepak, M.D.*, 51 FR 17556; ordering pharmaceutical cocaine allegedly for patient use while using it for personal use, maintained false records, patients stated that he did not treat them with cocaine, federal grand jury indicted him with obtaining cocaine by misrepresentation, fraud and forgery, deception 21 U.S.C. 843(a)(3), plead guilty and sentenced, surrendered medical license and registration, lied to DEA during their investigation. *Shatz v. U.S. Dept. of Justice*, 873 F.2d 1089 (8th Cir. 1989).

The common thread running throughout the above cited cases is clear; the abuse of the doctor's license to prescribe drugs. This is the very reason behind the public interest amendment.

However, in cases where the physician's conduct is equally egregious as the above cited cases, the Administrator has not revoked the registration. Rather, the registration is only partially revoked or is revoked with the proviso that a new application will be favorable reviewed. In one case the physician prescribed controlled drugs without keeping adequate records. This very same physician prescribed drugs to an individual who had been dead for several years. The physician was able to do this because he did not conduct the customary check of the person to whom he was prescribing drugs. The drugs prescribed were highly addictive and it was later learned that the person to whom he was prescribing drugs was a known drug addict and trafficker. *Albert Lepis, M.D.*, Docket 85-42 51 FR 17555. Despite the doctor's gross malpractice and abuse of his certificate of registration the Administrator did not revoke his registration. Rather, the Administrator only revoked a portion of his registration. This allowed the doctor to prescribe the most commonly used medicines. The basis for the decision was that the doctor needed to prescribe the remaining drugs in order to continue his practice. There was some suggestion that the doctor's clientele were primarily senior citizens and dependent on the good doctor. The remarkable aspect of

this decision is that notwithstanding the legislative intent behind the public interest amendment, and the admitted abuse of the registered doctor is that the doctor was allowed to continue to prescribe dangerous and controlled substances.

Likewise in the case of *Norman Alpert, M.D.*, Docket No. 92-50, 58 FR 67420 (1993), we have the case of a physician who used his licensed to prescribed large quantities of schedule II drugs to patients who never received them. He falsified medical records and ultimately had his medical license revoked by the controlling state agency.[3] Again in spite of the violative conduct the Administrative Law Judge recommended that the physician be allowed to continue his registration. This recommendation was adopted in its entirety by the Acting Administrator. In point of fact there was no action taken by the DEA. The basis for the inaction as contained in the ruling was due to the six years between the illegal conduct and the time of the DEA review. It should be noted that a DEA registration comes up every three years.[4] Consequently, the DEA had a chance to review the application at an earlier time. The decision suggests that given the lapse of six years and the lack of evidence that the doctor engaged in questionable conduct during that time, that continued registration was not inconsistent with the public interest. It should be noted that this case was ruled upon by the Administrative Law Judge, Mary Ellen Bittner, and the Acting Administrator, Stephen Greene, both of whom ruled upon Dr. Azen's registration.

In yet another case we see a very favorable decision in the face of gross malpractice by the doctor. *James C. Womack, M.D.*, Docket No. 92-35, 58 FR 7249. In

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[3] Each respective state has an agency or board which is authorized to oversee the issuance of medical licenses to practice medicine. This is distinct and independent from the DEA certificate of registration which allows for the dispensing, administering and prescribing controlled substances.

[4] Dr. Azen's current California medical license is in active status.

Womack, the doctor personally abused drugs. In spite of the revocation of his certificate of registration the doctor continued to prescribe controlled drugs under his father's DEA registration number. It was found that he was fully aware that he had no authority to prescribe drugs, and in point of fact, offered little explanation for his conduct. It was additionally found that his behavior posed a serious and immediate threat to the public. In denying the doctor's current application the Administrator specifically stated that an application for renewal in one year will be favorably considered. In support of the decision the Administrator commented on the contribution to the medically underserved in the community.

Additionally, we have a case where the court actually acknowledged the DEA's harshness in its knee jerk revocation of a ceritficate of registration. *Sokoloff v. Sazbe*, 501 F.2d 571 (2nd Cir. 1974). Practicing since 1957 Dr. Sokoloff was indicted on nine counts of distributing amphetamine sulfate and amphetamine hydrochloride tablets, Schedule II narcotics. Dr. Sokoloff pled nolo contendere to three counts of illegally distributing controlled substances. The Administrator revoked a certification contrary to the Administrative Law Judges's recommendations, who had recommended continued registration. Dr. Sokoloff's new application, however, was approved by the Administrator with the exception of Schedule II narcotics.

In spite of the conviction and in spite of the evidentiary issues which it claimed the Administrator did not violate, the Court felt that the revocation was unduly harsh on the following grounds: because the doctor was a first time offender, the sentencing judge found that his background should be given "considerable positive effect" and that it was unlikely he would again violate the drug laws. The Court recognized that the physician's capacity to practice medicine was seriously affected by the revocation. Thereafter, the Court strongly suggested to the Administrator that he give serious consideration to new application.

Because of the wide range of decisions which are based upon substantially similar facts and circumstances, it is virtually impossible for physicians brought under the authority of the DEA to correctly conduct themselves. The only identifiable factor providing a basis for these inconsistencies, is the wide discretion the Act bestows upon the Administrator. This is precisely why the Respondents and each of them should be made to answer this Petition. They will argue that the evidence presented provided them with the basis for their decision. As will be discussed below, however, the DEA has fallen short of satisfying its burden.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW MUST BE SUPPORTED BY SUBSTANTIAL EVIDENCE IN THE RECORD AS A WHOLE.

Findings of fact and conclusions of law must be supported by substantial evidence in the record as a whole. The Administrative Procedure Act 5 U.S.C. § 706(2), requires the reviewing court to set aside agency action if it appears that action is arbitrary. Additionally, the court should make a searching and careful inquiry of the record in order to ascertain whether the agency decision was based on consideration of relevant factors and whether there has been a clear error in judgment. *Duke Power Co. v. U.S. Nuclear Reg. Com'n*, 770 F.2d 386 (4th Cir. 1985).

The administrator's findings of fact must be supported by substantial evidence in the record as a whole. *American Textile Mfr. Inst., Inc. v. Donovan*, 452 U.S. 490 (1981). Remand will be made when it is unclear whether the Administrator actually considered the relevant factors at all, *Trawick*. An Administrator has to make a sufficient and independent basis for his decision. To the extent that the Administrative Law Judge's decision is adopted by the Administrator an independent basis is not required.

And likewise, to the extent that an Administrative Law Judge's decision is not adopted, then an independent basis is required, *Trawick*.

As noted in the above statement of facts, the Administrator did not adopt the Administrative Law Judge's decision in toto. Yet, his decision fails to provide an independent basis upon which to base his decision. He failed to produce substantial evidence for his decision.

Substantial evidence has been held to be such reliable and relevant evidence as a reasonable might accept as adequate to support a conclusion, *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951). *Richardson v. Perales*, 402 U.S. 389, 401 (1983) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1971). The act places responsibility for determining substantial evidence in the Courts of Appeals, 21 U.S.C. § 877. Additionally, 5 U.S.C. § 556(d) (1977 & 1991 Supp.), provides that the proponent of an order shall have the burden of proof. Proponent is defined as a party who propounds or proposes something. *Orsinger Outdoor Advetrising, Inc. v. Department of Highways*, 752 P.2d 55 (Colo. 1988). *Colorado Dog Fanciers v. Denver*, 820 P.2d 644 (Colo. 1991). The Court may interfere with the Administrator's decision to deny the application "only if the decision is not permitted by law or is unjustified by the facts." *Fourth Street Pharmacy v. United States Department of Justice*, 863 F.2d 1137, 1138 (8th Cir. 1988). It is clear that the burden of persuasion and production on the issue of whether registration would be in the public interest is correctly placed on the Administrator as an initial matter. Once the Administrator produces the required substantial evidence, the burden of production only then shifts to registrant.

It is evident from the record that the decision to revoke Dr. Azen's registration was based in large part on two issues; the felony conviction and Dr. Azen's honest

and forthright admission that he had used drugs in his past. There is simply no basis in fact to support the Administrator's allegation that petitioner has not fully recognized and admitted his prior drug abuse problem. The only evidence presented by the Government to support this conclusion came from a hearsay report prepared by a Government employed witness who never met with Dr. Azen or spoke to any of his colleagues. In point of fact, he never interviewed anyone. The witness prepared his report only three weeks after Dr. Azen's arrest which occurred over three years ago. Counsel for Dr. Azen was precluded from conducting cross-examination of the Government's doctor. Petitioner, on the other hand, subpoenaed doctors who have worked with Dr. Azen for over ten years. Moreover the board conducted countless interviews with many hospital employees, all of whom stated that there was never any drug use by Dr. Azen at any time while at the hospital. Additionally, petitioner has submitted to random drug testing which was documented by the probation officer, and to which he continues to submit, despite the probation officer's request of Dr. Azen that his drug testing be terminated. Evidence was also produced indicating that in addition to the random drug testing conducted by and through the Los Angeles Probation Office, Dr. Azen is receiving one on one therapy from a private psychologist. It is obvious that the proponent of the order did not meet its burden of proof.

Finally, testimony was given by the hospitals Administrator who apprised the Judge of the needs of the community surrounding Pacifica Hospital. This is an emergency room located in the inner city. This is an emergency room which sees a disproportionate amount of shootings, stabbings, beatings, drug overdoses, and child abuse trauma cases. This is not the kind of location which attracts many doctors, especially doctors with Dr. Azen's expertise. At Pacifica Hospital the hours are long and the compensation is considerably less than other hospitals in the Los Angeles area.

Regarding the felony conviction, we have seen from the above cited cases that conduct of a substantially more egregious character by medical doctors went unpunished, or went substantially less punished. The Administrator will argue that the felony conviction alone is indicative of the potential harm to the public interest. The Government, however, with all of their resources and investigators were unable to produce anything to support their presumption. It should be noted that the Attorney General may in his discretion, suspend any registration simultaneously with the institution of proceedings under this section in cases where he finds that there is imminent danger to the public's health and safety. *Thomas H. McCarthy, D.O.*, Docket No. 88-5 54 FR 20936. Had the Government felt that there was a danger to the community they had the authority to immediately revoke Dr. Azen's registration. It is obvious that the public interest was not a concern to the DEA given that more than three years has elapsed since Dr. Azen's arrest.

Petitioner maintains that the Government did not meet their burden.

CONCLUSION

A writ should issue requiring the Respondents to answer this petition in order to clarify the basis for their decision.

Respectfully submitted,

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May 6, 1994

APPENDIX

DRUG ENFORCEMENT ADMINISTRATION

[Docket No. 92-54]

STANLEY ALAN AZEN, M.D., REVOCATION OF REGISTRATION

On May 19, 1992, the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration [DEA], issued an Order to Show Cause to Stanley Alan Azen, M.D. [Respondent], of Los Angeles, California. The Order to Show Cause proposed to revoke Dr. Aben's DEA Certificate of Registration, AA8786329, under 21 U.S.C. 824(a)(2) and (a)(4), and deny any pending applications for renewal of such registration under 21 U.S.C. 823(f) for reason that his continued registration would be inconsistent with the public interest.

Respondent, through counsel, requested a hearing on the issues raised by the Order to Show Cause, and the matter was docketed before Administartive Law Judge Mary Ellen Bittner. Following prehearing procedures, a hearing was held on Los Angles, California, beginning on January 8, 1993. On October 18, 1993, in her opinion and recommended ruling, findings of fact, conclusions of law, and decision, the administrative law judge recommended that the Administrator revoke Respondent's DEA Certificate of Registration.

On November 2, 1993, the Respondent filed exceptions to Judge Bittner's opinion pursuant to 21 CFR 1316.66, and on November 18, 1993, the administrative law judge transmitted the record to the Acting Administrator. The Acting Administrator has carefully considered the entire record in this matter and, pursuant to 21 CFR 1318.87, hereby issues his final order in this matter based upon findings of fact and conclusions of law as hereinafter set forth.

The administrative law judge found that the Respondent is an emergency room physician who received his

medical degree in 1978 from Loma Linda University of Medicine in Loma Linda, California. Following an internship at the University of Southern California, and his service of two residences in emergency medicine and internal medicine, Respondent worked at the Medical Center of North Hollywood from 1982 until 1991, and as of the date of the administrative hearing was employed at Pacifica Hospital in Los Angeles.

The administrative law judge found that on September 20, 1990, Los Angeles Police Department officers received a report that a woman had died at Respondent's home, apparently from a drug overdose. The administrative law judge found that when the officers arrived at the Respondent's residence, they were advised by the Respondent that the deceased was his girl friend, and that earlier in the evening Respondent and the deceased had consumed alcohol, smoked marijuana, and snorted cocaine.

One of the officers present at Respondent's house on that evening testified at the administrative hearing that the police officers found inside Respondent's home two 5- by 7-inch cards with white power on them and four small straws in a trash can, powder on the bedboard, and glasses containing what appeared to be alcohol residue. The officer further testified that although the items were seized, to his knowledge, no tests were conducted on them.

The administrative law judge found that as a result of reports regarding the death of Respondent's girl friend, the Medical Board of California (Board) initiated an investigation of the Respondent. One of the Board investigators that participated in the investigation also testified at the administrative hearing. Interviews were conducted of various law enforcement officials, including the pathologist who examined the Respondent's deceased girl friend. The pathologist estimated that, at the time of the girl friend's death, there was approximately 20 times a fatal

quantity of cocaine in her system, and, in addition, a large quantity of cocaine metabolites. The Board investigator also interviewed the Los Angeles County coroner, who found a large amount of cocaine in the deceased's personal property. The coroner further stated that Respondent told the coroner that Respondent and the deceased commonly used cocaine and alcohol on their days off.

The Board investigator interviewed the sister of the deceased, who revealed to the investigator that she used cocaine with Respondent and the deceased on numerous occasions. The deceased's sister informed the Board investigator of her knowledge that Respondent sold cocaine and that she had purchased it from him in the past.

The Board investigator also interviewed two acquaintances of the Respondent, both of whom admitted purchasing cocaine from the Respondent on various occasions. One of the individuals stated that for a two to three year period, Respondent was his sole source of cocaine, that he purchased cocaine in half gram quantities from the Respondent, and that the Respondent made no profit from his sales. The individual went on to state that Respondent had a very high tolerance for cocaine, and carried a small vial of it with him, however he never saw Respondent use cocaine while working.

The Government also presented the testimony of a detective of the Narcotics Division of the Los Angeles Police Department regarding his conversations with the sister of the deceased. The sister told the detective that she purchased cocaine from the Respondent on several occasions; that Respondent sold cocaine to employees of the hospital where he was employed; and that her sister (the deceased) had access to the safe where the Respondent kept his cocaine.

The administrative law judge found that in March 1991, the deceased's sister, acting as a confidential informant, attempted a controlled purchase of cocaine from

the Respondent. Prior to going to Respondent's home on March 29, 1991, the detective searched the sister's clothing and car, and provided her with $100.00, however, the sister was not searched because there were no female officers on duty. The detective also conceded at the hearing that the informant's shoes were not searched, nor was there a search of the trunk or the engine compartment of her car.

The sister was observed going into Respondent's home where she remained for 20 to 30 minutes. After leaving Respondent's home, she met the detective at a pre-arranged location and turned over two containers of white powder, which later tested positive for cocaine. She told the detective that she paid the Respondent $60.00 for the cocaine.

On April 5, 1991, the Respondent was searched pursuant to a search warrant. The search revealed an amber glass vial that contained a white powder resembling cocaine. Respondent was then arrested, and allegedly stated to the arresting officer, that, "I'm just a recreational user. People don't go to jail for using cocaine." Respondent later stated, "its not my cocaine. I just store it for someone. He gives me cocaine for allowing him to store it in my house."

A search was then conducted of Respondent's house which revealed a safe which contained, among other things, two one-gram scales commonly used to weigh and package cocaine, a clear plastic bag containing a substance which was later confirmed to be two ounces of cocaine, as well as cocaine residue on various other items. A quantity of cocaine was also obtained after scraping screens, grinders, and scales found in the safe. In addition, 19 grams of marijuana were seized from the bedroom. Respondent was arrested and charged with the transportation and possession of cocaine.

On April 16, 1991, in the Municipal Court of Los Angeles Judicial District, a four-count felony complaint

was filed against the Respondent charging him with the sale and possession of a controlled substance. Respondent pled *nolo contendere* to one felony count of simple possession of a controlled substance on November 15, 1991. The Superior Court of California, County of Los Angeles convicted Respondent and sentenced him to 180 days in county jail, and three years probation. A conviction following a plea of *nolo contendere* is a "conviction" within the meaning of 21 U.S.C. 824(a)(2), *Sokoloff v. Saxbe*, 501 F.2d 571 (2nd Cir. 1974).

The Respondent testified at the administrative hearing that he first experimented with marijuana and cocaine in the 1970's and became a regular cocaine user during the 1980's. Respondent further testified that during the years of his cocaine use, his house served as a gathering place for himself, his live-in girlfriend, her sister, as well as several of their friends.

Respondent testified that he never sold cocaine to anyone, and that those individuals that stated that Respondent sold them cocaine, all had a motivation to lie, and make Respondent appear responsible for his girlfriend's death.

Respondent testified that he briefly participated in the California Medical Board's diversion program for impaired physicians, however he stated that he was rejected from the program because of pending criminal charges against him. Respondent also testified to his participation in a drug rehabilitation program at the Betty Ford Clinic, starting in April 1991, and that during his six months in the program he never tested positive for drugs.

After his conviction and as part of his probation, Respondent was enrolled in a drug rehabilitation program and was subjected to random urinalysis from November 1991 until December 1992. None of these random tests revealed drug use. Respondent's probation officer testified that she would recommend discontinuing drug testing for

Respondent because he had met the criterion of six months of negative drug tests.

In December 1991, the Board investigator received a letter from a medical consultant for the Medical Board, advising that Respondent's case should be referred to the Office of the Attorney General for administrative action against Respondent's medical license. The consultant further stated that he considered Respondent's rehabilitative attempts insufficient to overcome his more than 20 year addiction to drugs. On April 1, 1992, the Medical Board filed an accusation against Respondent, and a supplement therein was filed on May 26, 1992. The accusation alleged that Respondent was subject to disciplinary action for using, possessing and distributing cocaine. At present, no further action has been taken by the Board.

At the hearing in this matter, physicians who have supervised Respondent testified on Respondent's behalf. They testified to Respondent's professionalism and exemplary abilities.

Pursuant to 21 U.S.C. 824(a)(2), the Administrator may revoke a DEA Certificate of Registration if the registrant has been convicted of a felony relating to controlled substances. Pursuant to 21 U.S.C. 823(f) and 824(a)(4) the Administrator may revoke a registration and deny any application for such registration, if he determines that the continued registration would be inconsistent with the public interest. Section 823(f) requires that the following factors be considered:

"(1) The recommendation of the appropriate State licensing board or professional disciplinary authority.

(2) The applicant's experience in dispensing controlled substances.

(3 The applicat's conviction record under Federal or State laws relating to the distribution, or dispensing of controlled substances.

(4) Compliance with applicable State, Federal, or local laws relating to controlled substances.

(5) Such other conduct which may threaten the public health and safety."

It is well established that these factors are to be considered in the disjunctive, i.e., the Administrator may properly rely on any one or combination of the factors and give each factor the weight he deems appropriate. See Henry J. Schwarz, Jr., M.D., Docket No. 88-42, 54 FR 16422 (1989).

The administrative law judge found that the Respondent had been convicted of a felony offense relating to controlled substances, and therefore grounds exist to invoke his DEA Certificate of Registration pursuant to 824 (n)(2). In considering whether grounds exist to revoke Respondent's registration pursuant to 21 U.S.C. 824 (a)(4), the administrative law judge found factors one, three, four and five listed in 823(f) relevant. Factor one is applicable by virtue of the California Medical Board's filing of an Accusation and Supplemental Accusation against the Respondent. Factor three is applicable to Respondent's felony conviction, and factors four and five were found relevant based upon Respondent's abuse and alleged unlawful sale of controlled substances, as well as the subsequent related criminal charges.

The administrative law judge concluded that the Government did not prove by a preponderance of the evidence that the Respondent sold cocaine to his girlfriend's sister on March 29, 1991. The administrative law judge made this determination based upon the fact that neither the deceased's sister nor her car was thoroughly searched prior to her entering Respondent's house; that the alleged purchase was neither seen nor heard by law enforcement personnel; and that the sister of the deceased had a reason to lie.

The administrative law judge found that the record clearly established that Respondent has abused controlled

substances for many years. The administrative law judge also found that there was insufficient evidence to conclude that Respondent has recognized and dealt with the severity of his problem, or that he has progressed in his recovery to the extent that he should be permitted to continue to hold a DEA registration. Based upon evidence of Respondent's felony conviction and past drug abuse, the administrative law judge recommended that Respondent's DEA Certificate of Registration be revoked and any pending applications be denied.

The Respondent filed exceptions to the administrative law judge's recommendation. The Respondent argued in part: That the administrative law judge's recommendations were inconsistent with the testimony given by Respondent, particularly as it related to the duration of Respondent's use of cocaine and marijuana, and the extent of the use of cocaine by Respondent's friends and acquaintances while at his home; that although the administrative law judge concluded that the Government failed to establish that a controlled buy took place, the administrative law judge nevertheless made unnecessary reference to events surrounding its occurrence; that the Respondent has demonstrated a lifelong commitment to drug rehabilitation based in part on his nearly three year successful participation in a strict and monitored regimen of randum drug testing administered through the Probation Office of Los Angeles County; that based upon the legislative intent of the public interest amendment to the Controlled Substances Act, felony convictions are not per se violations since Respondent's crime did not involve abuse of prescription drugs; statements relied upon by the administrative law judge regarding Respondent's insufficient attempts at drug rehabilitation in light of his 20 year drug addiction, were based on faulty and incomplete evidence.

The Acting Administrator having considered the entire record adopts the administrative law judge's findings of fact, conclusion of law, and recommended ruling, in part.

The Acting Administrator concurs with the Respondent's exception to the administrative law judge's finding of fact regarding testimony attributed to the Respondent of his friend's and acquaintances daily partaking of food, drink, and cocaine while at Respondent's home. While the record is not clear as to the exact time Respondent starting using cocaine, it is clear that he abused drugs for a significant period of time. Additionally, the record does not support Respondent's allegations regarding the administrative law judge's reliance on factors involving the alleged controlled buy. Finally, the record does not show that the Respondent has demonstrated a life long commitment to drug rehabilitation, nor that the administrative law judge, in making her recommendation, unduly relied upon the conclusions of the California Medical Board consultant that the Respondent's rehabilitative attempts were insufficient to overcome his 20 year addiction to drugs.

Respondent further argued that his felony convictions are not per se violations since his crime did not involve improper prescribing of controlled substances. DEA Administrators have consistently held that controlled substance related felony convictions need not involve the misuse of a DEA registration to justify revocation of the registration or denial of an application for registration. See *William H. Carranza, M.D.*, Docket No. 84-23, 51 FR 2771 (1988), *Paul Stepak, M.D.*, 51 FR 17550 (1986).

Respondent's history of noncompliance with the laws relating to controlled substances speak for itself. The Respondent not only admitted to a long history of drug abuse, but he also admitted to using cocaine and marijuana with friends, including his use of these controlled substances on an occasion when his girlfriend died as a result of cocaine use. The totality of the facts lends to the conclusion that the continued registration of Dr. Azen would be inconsistent with the public interest.

Accordingly, the Acting Administrator of the Drug Enforcement Administration, pursuant to the authority vested in him by 21 U.S.C. 823 and 28 CFR 0.100(b), hereby orders that DEA Certificate of Registration. AA8700329, issued to Stanley Alan Azon, M.D., be and it hereby is, revoked, and any pending applications be, and they hereby are, denied. This order is effective March 3, 1994.

Dated: February 25, 1994.

Stephen H. Greene.

Acting Administrator of Drug Enforcement.

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[Filed Mar. 25, 1994]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 94-70124

DEA #92-54

STANLEY ALAN AZEN, M.D.,
Petitioner,

vs.

DRUG ENFORCEMENT AGENCY, *et al.*,
Respondents.

ORDER

Before: FLETCHER and TROTT, Circuit Judges

Petitioner's emergency motion for a stay of the Drug Enforcement Agency's certificate of registration revocation order pending review is denied. This court's March 23, 1994 scheduling order shall continue to govern this petition for review.